

WONG TECK CHOY*a***v.****PP**

COURT OF APPEAL, PUTRAJAYA

b

GOPAL SRI RAM JCA

RICHARD MALANJUM JCA

NIK HASHIM JCA

[CIVIL APPEAL NO: N-05-8-2003]

13 JUNE 2005

c

CRIMINAL LAW: Penal Code - Section 300 - Murder - Appeal against conviction and death sentence - Private defence and excess of private defence within second exception to s. 300 - Whether facts and evidence before trial judge admitted of defence

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This was the appellant's appeal against his conviction for murder and death sentence. The appellant was said to have shot the deceased following an argument because the deceased had parked his car blocking the appellant's parked car. The appellant alleged that the deceased wielded a knife that led him to shoot the deceased out of fear for his own life. As such, the appellant raised two defences, firstly, that of private defence and secondly, that of excess of private defence to bring his case within the exception to s. 300 of the Penal Code so as to reduce his crime to one of culpable homicide not amounting to murder. The appellant alleged, *inter alia*, that the learned judge had relied on the evidence of PW10 who was an interested witness as she was the sister-in-law of the deceased and had not given weight to the fact that a knife was found at the murder scene.

*e**f***Held (dismissing the appeal)****Per Gopal Sri Ram JCA:**

- [1] Where private defence is put forward as an answer to a criminal charge, there is a duty upon the prosecution to show beyond reasonable doubt that the accused did not act in self-defence. Consequently, if the accused raises a reasonable doubt about the existence of the right of private defence he is entitled to be acquitted of the charge. One of the cardinal principles governing the right of private defence is that the exercise of that defence should not exceed what is reasonably necessary to avert the assailant's attack. (p 436 b-c)

*g**h**i*

- a* [2] It was true that PW10 was married to the deceased's brother at the time she gave evidence. But there is no legal presumption that an interested person should not be believed. The learned judge had undertaken a sufficient judicial appreciation of PW10's evidence. It was also well within the province of the learned judge to treat the inconsistencies between
- b* PW10 and other witnesses as minor discrepancies. Further, the evidence of PW10 was supported by other witnesses in material particulars. (pp 437 f & 438 b)
- c* [3] The learned judge was very much alive to the fact that the knife was found at the scene. He gave no weight to it because of the place where it was found and the distance from which it was found from the deceased. He also took into account that apart from the appellant no witness testified that the deceased was armed with a knife. (p 438 d)
- d* [4] There was only one critical question of fact before the learned judge for determination. That question was whether the deceased attacked the appellant with a knife. The learned judge answered the question in the negative. He further held that the appellant failed to raise a reasonable doubt on that issue. He arrived at his conclusion after a careful analysis of the facts and undertaking a probative measurement of all the evidence led before him. (pp 438 & 439 a)
- e*
- f* [5] The issue whether the plea of private defence was fairly open to the appellant in the circumstances of the case was a pure question of fact well within the province of the trial judge. He came to the conclusion that the facts and evidence before him did not admit of the defence. He also considered the second exception to s. 300 of the Penal Code and concluded that it was also not available to the appellant. Those were correct directions based on the findings of fact that he made after an analysis of the material before him. It followed that there were settled principles herein that clearly ousted appellate intervention. (p 439 b-c)

g **[Bahasa Malaysia Translation Of Headnotes]**

- h* Ini adalah rayuan perayu terhadap sabitan kesalahan bunuh dan hukuman mati yang dijatuhkan ke atasnya. Perayu didakwa telah menembak si mati ekoran satu pertengkaran yang berpunca dari tindakan si mati meletakkan keretanya dengan cara yang menghalang kereta perayu. Perayu menyatakan bahawa si mati telah menggunakan pisau menyebabkan beliau terpaksa menembak si mati demi menyelamatkan nyawanya. Berikutnya, dua pembelaan telah dibangkit oleh perayu, iaitu, pertama pertahanan diri dan kedua pertahanan diri yang berlebihan yang menjadikan kesnya termasuk ke dalam pengecualian s. 300
- i* Kanun Jenayah sekaligus menurunkan jenayahnya kepada perbuatan homisid

salah tak sampai membunuh. Hujah perayu, antara lain, adalah bahawa yang arif hakim telah bergantung kepada keterangan PW10, iaitu ipar si mati yang merupakan seorang saksi berkepentingan, dan tidak memberi penekanan kepada fakta bahawa pisau telah ditemui di tempat kejadian.

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Diputuskan (menolak rayuan)

Oleh Gopal Sri Ram HMR:

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[1] Di mana pertahanan diri digunakan untuk menyangkal pertuduhan jenayah, beban adalah atas pendakwaan untuk membuktikan di luar keraguan munasabah bahawa tertuduh tidak bertindak untuk pertahanan diri. Oleh itu, sekiranya tertuduh membangkitkan keraguan munasabah tentang kewujudan pertahanan diri maka ia berhak untuk dibebaskan dari pertuduhan. Salah satu prinsip terpenting yang mengawal hak pertahanan diri adalah bahawa pelaksanaan hak tersebut hendaklah tidak melebihi dari apa yang seperlunya bagi mematahkan serangan penyerang.

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[2] Memang benar bahawa PW10 sewaktu memberi keterangan adalah ipar si mati. Namun, tiada anggapan undang-undang bahawa seorang yang berkepentingan adalah tidak boleh dipercayai. Yang arif hakim telah membuat pertimbangan kehakiman yang memadai terhadap keterangan PW10. Yang arif hakim juga berhak untuk menganggap perselisihan antara keterangan PW10 dengan keterangan saksi-saksi lain sebagai perselisihan kecil sahaja. Lagipun, aspek-aspek penting keterangan PW10 adalah disokong oleh saksi-saksi lain.

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[3] Yang arif hakim amat menyedari bahawa pisau telah ditemui di tempat kejadian. Namun beliau tidak memberi sebarang pertimbangan kepadanya disebabkan oleh tempat di mana ianya dijumpai dan jarak di antaranya dengan si mati. Beliau juga mengambil kira bahawa selain dari perayu, tiada saksi lain menyatakan bahawa si mati bersenjatakan pisau.

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[4] Terdapat hanya satu persoalan fakta penting di hadapan yang arif hakim yang perlu diputuskan. Ianya adalah sama ada si mati telah menyerang perayu dengan pisau. Yang arif hakim menjawab soalan ini secara negatif. Beliau memutuskan selanjutnya bahawa perayu gagal membangkitkan keraguan munasabah atas isu tersebut. Beliau mencapai rumusan ini dengan menganalisa fakta-fakta secara teliti dan mengambil kira secara probatif kesemua keterangan yang berada di hadapannya.

*g**h*

[5] Isu sama ada pembelaan pertahanan diri terbuka kepada perayu dalam halkeadaan yang wujud adalah isu fakta sepenuhnya yang termasuk dalam bidang tugas hakim bicara untuk memutuskan. Beliau mencapai konklusi bahawa fakta-fakta dan keterangan di hadapannya tidak menyokong

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- a* pembelaan tersebut. Beliau juga telah mempertimbang pengecualian kedua s. 300 Kanun Jenayah dan merumuskan bahawa ia adalah tidak terbuka kepada perayu. Ini adalah arahan-arahan yang betul yang dibuat berdasarkan kepada analisa material yang ada di hadapan mahkamah. Dengan itu, berdasarkan prinsip mantap, peringkat rayuan tidak boleh
- b* campur tangan di sini.

Case(s) referred to:

Andy Bagindah v. PP [2000] 3 CLJ 289 CA (*refd*)

Jayasena v. R [1970] AC 618 (*refd*)

Lee Thian Beng v. PP [1972] 1 MLJ 248 (*refd*)

- c* *PP v. Datuk Hj Harun Hj Idris (No 2)* [1977] 1 MLJ 159 (*refd*)

PP v. Foong Chee Chee Cheong [1970] 1 MLJ 97 (*refd*)

Ya Daud v. PP [1996] 2 CLJ 540 HC (*refd*)

Zacevic v. Director of Public Prosecutions [1987] 162 CLR 645 (*refd*)

Legislation referred to:

- d* Evidence Act 1950, s. 105
Penal Code, s. 300

For the appellant - Muhammad Shafee Abdullah (Frida Krishnan, Amy Chong Boon Chin & Goi Soon Seng with him); M/s Shafee & Co

For the respondent - Kamaruzaman Abdul Jalil DPP

- e* [Appeal from High Court, Seremban; Criminal Trial No: 45-3-2001]
Reported by Usha Thiagarajah

JUDGMENT

- f* **Gopal Sri Ram JCA:**

The appellant was convicted by the High Court at Seremban of the offence of murder and sentenced to death. The facts giving rise to the conviction are as follows.

- g* On 13 January 2001 the appellant had gone to the Goal Pub at Taman Thivy Jaya, Seremban. He parked his car and went in. He did not consume any alcohol while there. At about midnight, he emerged to find that his car had been blocked by a Honda motorcar. The appellant began to curse the driver of the Honda in Cantonese. He admits he used foul language. At about that time, the driver of the Honda came along. He is the deceased. According to
- h* PW10 who is now the deceased's sister-in-law the deceased was passive and it was the appellant who drew his handgun and shot the deceased. PW10 went on to testify that the deceased was unarmed and stood about 14 feet away from the appellant when the appellant discharged his firearm. Another witness,

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PW12, a friend of the appellant said that he saw the deceased attacking the appellant. He also said that the deceased had something in his hand. After the incident, the deceased was taken away to the hospital where he was pronounced dead.

According to the appellant, shortly after he had cursed the driver of the Honda motorcar, he was confronted by the deceased. An altercation took place in which he was the victim and the deceased the attacker. He claims the deceased to have wielded a knife. Fearing for his life the appellant shouted a warning at the deceased in Cantonese that he (the appellant) was carrying a gun. The deceased having nevertheless advanced further, the appellant shot the deceased. The appellant therefore squarely raised two defences. First, that of private defence. Second, that of excess of private defence to bring his case within the second Exception to s. 300 of the Penal Code so as to reduce his crime to one of culpable homicide not amounting to murder.

On the facts as established there does not appear to be any dispute that the prosecution had established all the ingredients of the offence of murder. What the appellant did was to say that notwithstanding all the ingredients having been established, he was entitled to be legally excused for the crime because he acted in private defence or alternatively if he acted in excess of that defence, his case came within Exception 2 to s. 300. The burden therefore fell on the appellant to establish either defence on a balance of probabilities. This is because of s. 105 of the Evidence Act 1950. See, *Jayasena v. R* [1970] AC 618. The nature of the onus on an accused was considered by Nik Hashim J in *Ya bin Daud v. Public Prosecutor* [1996] 2 CLJ 540 as follows:

The right of private defence is one of the general exceptions set out in Chapter IV of the Code, proof of which by virtue of s. 105 of the Evidence Act 1950 rests on the accused, and the burden is not a heavy one. Spenser Wilkinson J in *Raman v. PP* [1948-49] MLJ Supp 146, said:

In criminal matters, whilst it is true that s. 105 of the Evidence Enactment casts the burden upon an accused person of proving the existence of circumstances bringing the case within any special exception contained in the Code, it has always been held, not only that this burden is not a heavy one but also that the accused is entitled, if he can, to bring himself within the exceptions by reference to facts proved by the prosecution evidence.

Having considered the provisions in the Code on the right of private defence, and its principles in the cases aforesaid, the court has to decide whether the appellant was acting under a reasonable apprehension that death or grievous hurt would be caused to him by the assailants. Whether the apprehension was

- a* reasonable or not is a question of fact. The weapon used, the manner of using it, the nature of assault and other surrounding circumstances are to be taken into account (*Ratanlal: The Law of Crimes* (22nd edn) p 220).

We respectfully agree with this statement of the law.

- b* It follows that where private defence is put forward in answer to a criminal charge, there is a duty upon the prosecution to show beyond reasonable doubt that the accused did not act in self-defence. Consequently, if an accused raises a reasonable doubt about the existence of the right of private defence he is entitled to be acquitted of the charge: *Zecevic v. Director of Public Prosecutions* [1987] 162 CLR 645. One of the cardinal principles governing the right of private defence is that the exercise of that defence should not exceed what is reasonably necessary to avert the assailant's attack. See, *Lee Thian Beng v. PP* [1972] 1 MLJ 248, per Ong Hock Sim FJ.

- d* Returning to the present case, it is crystal clear from the evidence of PW10 that the deceased was unarmed and standing some 14 feet away from the appellant. The learned judge accepted her evidence and this acceptance formed part of the frontal assault by the appellant upon the findings made. It is true that PW10 had already married the deceased's brother at the time she gave evidence and was therefore an interested witness. But as Gill J (later CJ, *e* Malaya) said in *Public Prosecutor v. Foong Chee Chee Cheong* [1970] 1 MLJ 97:

- f* There is certainly no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances (*Balasingham v. Public Prosecutor* [1959] MLJ 193).

- g* Now, we have read and re-read the learned judge's judgment and find that he has undertaken a sufficient judicial appreciation of PW10's evidence. He was very much aware of the apparent conflict between this witness and PW12. The latter had testified that there had been an attack by the deceased upon the appellant at close quarters. But the learned trial judge chose to accept the evidence of PW10 on material points. He gave reasons for the choice he made and we are really unable to detect any appealable error in his reasoning. He saw and heard the witnesses and was certainly in a better position than we are with the cold print of the record before us. There is no material from which *h* we can confidently say that he failed to seize upon and to utilise the audio-visual advantage he enjoyed. Indeed, when his judgment is read as a whole, it is clear that he took proper advantage of the fact that he had seen and heard the witnesses, particularly PW10 when making his assessment of this and other material witnesses. His conclusions based on the evidence of PW10 are beyond *i*

criticism and we therefore reject the appellant's submission that the learned judge misdirected himself in appreciating this witness' evidence. So far as this part of the case is concerned, we need do no more than to remind ourselves of what Raja Azlan Shah FJ (as he then was) said in *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 159:

In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

In the present case, the learned judge was very much alive to all points of conflict between the evidence of PW10 and other prosecution witnesses. He however classified them as minor discrepancies. Having been taken through the record of appeal with a fine-tooth comb by learned counsel for the appellant we are in agreement with the learned judge upon the issue of PW10's credibility. It was well within the province of the learned judge to treat the inconsistencies between PW10 and other witnesses as minor discrepancies. As Shaikh Daud JCA said in *Andy bin Bagindah v. Public Prosecutor* [2000] 3 CLJ 289 where a similar complaint was advanced:

There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

- a* A further point made by the appellant is that the evidence of PW10 is falsified by the evidence of the clinical pathologist PW9. We do not agree. As the learned deputy pointed out, PW9 quite frankly admitted in evidence that she is not knowledgeable about matters of forensic science. By contrast, the chemist (PW5) and the forensic expert (PW6) called by the prosecution were the true experts upon the subject of forensic science. The evidence of these two witnesses coupled with the surrounding circumstances tends to support the evidence of PW10 in material particulars. We therefore find no merit in this complaint of the appellant.

- c* The appellant also made complaint that the learned judge did not give any or any sufficient consideration to the importance of the finding of the knife at the scene of the incident when considering the plea of private defence. With respect we do not agree. It is clear from the judgment of the learned judge that he was very much alive to the fact that the knife had been found. But he gave that fact no weight because of the place where it was found and the distance from the knife to the place where the deceased was shot. He also took into account the fact that apart from the appellant no witness testified that the deceased was armed with a knife. All PW12 was able to say is that he saw something in the deceased's hand. The learned judge gave no weight to this part of PW12's evidence. He was entitled to do so. As we said earlier, he had seen and heard this witness and was obviously unimpressed with this part of his evidence. After careful consideration we are really unable to any valid ground to criticise the judge for the way in which he dealt with this part of the case.

- f* Another ground of complaint raised by the appellant is the failure of the learned judge to take into account the speed at which the relatives of the deceased threw away the shoes he wore on the night in question. It was argued for the appellant that this fact, taken together with the deceased's occupation as a re-possessor of cars justified the drawing of an inference that the knife at the scene came from the deceased's shoes. But there was no evidence from any witness to show the special significance of the deceased's foot ware. There was certainly no cross-examination directed by appellant's counsel in the court below to demonstrate the special features, if any of the deceased's shoes. In the absence of any such material on the point, learned counsel's argument is nothing more than pure conjecture which is as good as writ on water.

- h* In this case only one critical question of fact presented itself before the learned judge for determination. That question is whether the deceased attacked the appellant with a knife. Learned counsel for the appellant conceded that this was indeed the only issue of any importance in this case. The learned judge

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answered that question in the negative. He further held that the appellant had failed to raise a reasonable doubt on this issue. He arrived at his conclusion after a careful analysis of the facts and undertaking a probative measurement of all the evidence led before him. In our judgment, his direction unto himself is beyond criticism.

There were several other minor points raised by the appellant which do not amount to anything at all. At the end of the day, the issue whether the plea of private defence was fairly open to the appellant in the circumstances of the case is a pure question of fact well within the province of the trial judge. He came to the conclusion that the facts and evidence before him did not admit of the defence. He also considered the Second Exception to s. 300 and concluded that it was also not available to the appellant. These are correct directions based on the findings of fact that he made after an analysis of the material before him. In a case such as the present it is quite out of place for us to intervene when there are settled principles that clearly say that we ought not to.

Having satisfied ourselves that there is no misdirection on the part of the learned judge and that the conviction of the appellant is entirely safe in the circumstances of this case, we have no alternative but to dismiss this appeal. The conviction and sentence are affirmed.

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